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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 991

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS.

BRIEF OF THE RESPONDENTS EDWARD J. HUGHES AND LOUIE E. LEWIS IN OPPOSITION TO PETITIONER'S PETITION FOR THE WRIT OF CERTIORARI.

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THE BUNTHORP-WARREN PRINTING COMPANY, 211 WEST JACKSON, CHICAGO 56

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Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 132 F. 2d 476.

The decree rendered (Rec. 14) by the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissing the suit as to the Horner

executors and Edward J. Hughes, was entered November 21, 1941. A similar order sustaining the motion to strike and dismissing the suit as to the remaining defendant, Louie E. Lewis, was entered December 11, 1941 (Rec. 17).

Jurisdiction.

Respondents submit that this court should not take jurisdiction because no federal question is involved, no cause of action having been stated either under the Civil Rights Act or under the Fourteenth Amendment.

RESPONDENTS' ADDITIONAL STATEMENT OF THE MATTERS INVOLVED.

The present brief is intended to supplement the brief on behalf of the respondent executors of Henry L. Horner, deceased. It will not reiterate the substance of the argument presented in that brief; but it is felt that this court's deliberations may be assisted if certain considerations, additional to those submitted in the brief of the executors, are suggested in opposition to the granting of the present writ and if certain additional authorities deemed pertinent by counsel writing this brief are cited and discussed.

The opinion of the Circuit Court of Appeals grounds that court's decision entirely upon the principle that where an act is plainly and clearly forbidden by a state statute, the commission of that act, even if it results in a denial of "due process of law" or of "equal protection of the law", is nevertheless not such denial of due process or equal protection *by the state;* and this is true notwithstanding the fact that the actor is a state officer.

Since the Circuit Court of Appeals regarded this principle as a sufficient basis for affirming the decision of the District Court, the Circuit Court of Appeals did not find it necessary even to indicate that other important contentions were made by the appellees there (respondents here) in support of the District Court's judgment.

Although the respondents agree with the view of the Circuit Court of Appeals that this single principle is decisive of the instant case, nevertheless the respondents desire to indicate in this statement and urge in the argument in this brief additional grounds for the support of the decisions of the District and of the Circuit Court of Appeals.

Accordingly the respondents here indicate, without argument in this statement, the following such additional grounds for the affirmance of the decision of the District and of the Circuit Court of Appeals:

(1) The right of candidacy for nomination at a primary election is not a civil right either apart from or under the Constitution of the United States; and

(2) The official proclamation of the plaintiff's failure to achieve nomination, such proclamation having been made by the defendants as public officers, is conclusive and cannot be collaterally attacked.

The contentions above indicated, as well as the view expressed by the Circuit Court of Appeals, will be defended in the Argument in this brief. Throughout the argument the respondents will be referred to as "defendants".

SUMMARY OF ARGUMENT.

I.

The decision of the Circuit Court of Appeals was correct for the reason given in the opinion. The acts charged, having been prohibited by statute, were not those of the state or of the defendants in their official capacity.

II.

The complaint fails to state a cause of action under the Civil Rights Act because:

(i) The right of candidacy for nomination at a primary election is not a civil right either apart from or under the Constitution of the United States.

(ii) The official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally attacked.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals was correct for the reason given in the opinion. The acts charged having been prohibited by statute, the acts charged were not those of the state or of the defendants in their official capacity.

It is important to observe, at the very threshold of this case, that the plaintiff did not seek to prevent or undo any act of the State of Illinois. He did not seek to annul any judgment, install himself in any office, restrain any threatened unconstitutional prosecution or confiscation of his property, relieve himself from imprisonment or preserve his life under the Fourteenth Amendment.

He sought an award of damages against the defendants in their **individual capacities, to be satisfied from their private fortunes.** This is, of course, precisely the relief contemplated by the Civil Rights Acts **when the cause of action arises under that act.**

But in order to impress upon the facts pleaded the modality of a cause of action under the Civil Rights Act, he does not resort to the provisions of that act in so far as they were intended to prohibit racial discrimination. He relies upon the more general import of the equal protection clause of the Fourteenth Amendment.

Now the Fourteenth Amendment provides—not that no one shall suffer deprivation of life, liberty or property without due process of law or that none shall suffer the denial of equal protection—but that no **state** shall deny due process or equal protection.

In other words, in order to sustain his case, the plaintiff must treat the acts complained of as those of the state

in so far is they deny to him due process. Otherwise he makes no case under the Fourteenth Amendment. But, after having thus imputed the acts in question to the state, he must regard them as torts committed by the defendants as individuals for the purpose of amercing those individuals in damages.

It is easy to perceive that a public official, acting contrary to even the purport of a state's authority, acting maliciously and criminally, may incur private liability at common law, or under state statute. It is easy to perceive that an official clothed with discretion may exercise it so arbitrarily that, when his ruling, decision or other conduct is enforced by the courts or by the state's constabulary, the act may be so far that of the state as to amount to a denial of due process or of equal protection. But it is impossible to perceive how an act may be that of the state for the purpose of charging the state with denial of equal protection and yet so far a mere private tort **under the very laws of that state** as to entitle the plaintiff to sue under the Civil Rights Act when the state has not sanctioned the violation of its own laws by the action of its courts, its police force or its legislature.

A series of brief illustrations will make this point clear. Every larceny is a deprivation of property; and, since it is not deprivation by due process of law, it is obviously a deprivation without such due process. Every felonious homicide or kidnaping is likewise a deprivation of life or liberty, similarly without due process of law. But neither the trespass to goods in the larceny case, the killing in the homicide case nor the abduction in the kidnaping case is a violation of the Fourteenth Amendment because the act is not that of the state.

Now let us suppose that the trespasses above considered were committed by a police officer incidentally to an unlawful and malicious arrest in which the victim was denied his liberty, suffered a theft of his property or was killed.

If the premise of the plaintiff in the instant case is well conceived; the mere fact that the perpetrator of these torts (and crimes) was a police officer purporting to make an arrest under state law would afford the victim or his representative access to the federal courts under the Civil Rights Act. The officer having been a representative of the state, the acts would constitute a denial of due process and equal protection under the Fourteenth Amendment—which means by the state.

If the state so far sanctioned or condoned this misconduct by its officer as effectively to deny the victim or his representative access to the courts or process for the enforcement of civil liability, then indeed might a case arise under the Fourteenth Amendment; and this even though the denial was only in the administration of the laws and not in the terms of their texts upon the books.

But the deprivation would consist, not in the acts themselves, but in the sanction or condonation of those acts by state courts, agencies or other officials whose activities would amount to a bestowal upon the original torts of at least the color of state approval.

The defendants submit that it was never the intent of Congress that the Civil Rights Acts should open the doors of the federal courts to every plaintiff who has suffered a tort at the hands of a public officer, even though the latter may have pretended to some legal authority in committing the tort.

On the contrary, the Civil Rights Acts were passed to protect the members of the negro race from deprivation of their rights on account of race, color or previous condition of servitude, either by the state or by individuals. Admittedly, when either a public or a private act is done in violation of this purpose, an action will lie. **But when the occasion for the tort is race or color, no question of denial by a state of due process or equal protection under the Fourteenth Amendment is involved.**

The sections relied upon by the plaintiff are set forth in the margin.*

It is evident from a mere reading of the text of these provisions that they prohibit and provide a remedy for two very distinct classes of wrongs: *first*, wrongs whereby any person is denied the rights of white persons, and *second*, wrongs whereby any person is denied constitutional rights, privileges or immunities.

Any attempt, even by private individuals, to prevent a negro from enjoying the rights of white persons is actionable under this statute.

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* U. S. C. A. Title 8, Sections 41, 43 and 47 (3):

"§ 41. *Equal rights under the law.*

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." R. S. § 1977.

"§ 43. *Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." R. S. 1979; c. 22, § 1, 17 Stat. 13.

"§ 47 (3). *Conspiracy to interfere with civil rights.*

"*Depriving persons of rights or privileges.*

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." R. S. § 1980; c. 33, 12 Stat. 284; c. 22, § 2, 17 Stat. 13.

Similarly, any deprivation of the rights of any person, white or colored, is actionable under this act, **if the right is constitutional.** But—and this is the essence of the defendants' argument under the present Point—**there is no constitutional right to equal protection or due process of law which is violated unless the act in question be that of the state.**

In other words: When any law, state or federal, guarantees to colored persons the same rights as are guaranteed to white persons, any violation of such law may be actionable. When, however, no question of race is involved and the only law relied on is the Fourteenth Amendment, a case must be made of depsivation under that amendment: *and that amendment requires state action.*

THE AUTHORITY OF BARNEY VS. CITY OF NEW YORK. 193 U. S. 430.

The Circuit Court of Appeals relies upon and the plaintiff disputes the authority of the *Barney case* to support the opinion now under review. The defendants' attitude toward the applicability of this case to the case at bar may be stated as follows:

If the *Barney case* is not to be overruled, it is decisive of the instant case; for it directly holds that acts prohibited by a state statute cannot constitute state action unless it be shown that the state's courts or law enforcing officials will not enforce the statute. In the instant case, the plaintiff does not even intimate that the state courts will not afford him redress.

If, however, it be conceded (for the sake of argument only) that the *Barney case* was wrongly decided, that concession does not aid the plaintiff for this significant reason: In the *Barney case*, the plaintiff sought an injunction to restrain the expropriation of his property for public use. It is true that the expropriation who wholly un-

authorized. In fact, it was forbidden; and for that reason, this court denied relief. But even had the court held the contrary and granted the injunction, the relief granted would have restrained the acquiring of property for the state, even though the acquisition had been by contractors and the City's engineering department.

Such a holding would not have implied a decision that the defendant contractors and the city's engineers were liable to an action under the Civil Rights Statute.

None of the cases cited by the plaintiff indicates that the narrow holding of the *Barney case* has been retracted.

In the *Barney case* itself, this court recognized that where there is a measure of discretion to fix taxes or rates, an abuse of that discretion may be the "act of the state", even though a statute or the State constitution prohibits such abuse of discretion. The court said in the *Barney case* at page 440:

> "And so in *Regan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362, the general assembly of Texas had established a railroad commission and given it authority to fix reasonable rates, with discretion as to what rates were reasonable.
>
> And as the establishment of rates by the commission was establishment of rates by the State itself, and as the determination was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised their discretion unfairly."

This is really all that was held in this court's decisions which the plaintiff cites as repudiating the teaching of the *Barney case*. *Des Moines* v. *Des Moines City Railway Co.*, 214 U. S. 179; *Home Telephone Co.* v. *Los Angeles*, 227 U. S. 278.

The case of *Classic* v. *United States*, 313 U. S. 299, is not in point. That case held that it is a federal offense to

interfere corruptly with a federal election. The court does not decide that there was any violation of the Fourteenth Amendment. On the contrary, the court holds that the rights involved were guaranteed by Section 2 of Article I of the constitution. No such question is presented here.

II.

The complaint fails to state a cause of action under the civil rights act because:

(1) The right of candidacy for nomination at a primary election is not a civil right either apart from or under the constitution of the United States; and

(2) The official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally attacked.

Notwithstanding the gravity of the charges made against the defendants in plaintiff's complaint, the position of the defendants filing this brief can be stated briefly and argued simply.

The present defendants maintain, *first*, that the right to candidacy for nomination at a primary election is not in its nature a civil right, either at common law or within the contemplation of the constitution of the United States; and *second*, that the official pronouncement of the defendants declaring the plaintiff to have been defeated in his candidacy for nomination is—and, if the political and civic procedure of the state is to afford stability of government, necessarily must be—conclusive, so that such pronouncements are not subject to collateral attack.

(i)

The right of candidacy for nomination at a primary election is not a civil right either apart from or under the constitution of the United States.

That nomination to candidacy for public office does not sound in civil rights is clear, not only from the authorities hereafter cited, but upon contemplation of the most fundamental and elementary considerations of the nature and theory of government. Before noting the authorities recognizing and giving effect in the form of judicial precedent to these principles, let us consider the principles themselves.

Public offices are created, not for the benefit of those who achieve incumbency in them, but for the advancement and protection of the public. The social end subserved by representative government is the right of the people to be represented—not the right of any individual, for his own sake, to represent the people. It is true that one who has not only been *duly and fully elected* but *actually installed* in public office must necessarily be compensated by salary or fees for the service which he renders to the public; but even the payment of emolument to the holder of an office is primarily necessary, not in justice to him as an individual, but because without such emolument only the wealthiest of citizens could accept the trust reposed in them by the office. Therefore, both in justice to the individual and for the preservation of government, a public officer who has been elected, *has taken office, and has actually rendered service*, acquires rights measured in money for which an action will lie.

But, as we see from the authorities hereafter cited, the law does not recognize a right even in one who has been not merely nominated, but *duly and fully elected* to an office and who has been illegally denied access thereto by a false

election return to contest the election in virtue of any legal right in himself as the person actually elected. On the contrary, the legal theory of election contest is that *any* voter as a citizen has a right to insist in the courts that the people be represented by those actually elected; and that where a candidate can maintain an election contest at all, he does so *in virtue of his character as a voter* or elector, for the benefit of the public, and *not* because he was in fact elected and has been deprived of a civil right to the office; and apart from statutes, there is no right whatever to contest an election. *Donovan* v. *Comerford*, 332 Ill. 230; *Harding* v. *Gilbert*, 373 Ill. 94; and many cases there cited.

Similarly, it is axiomatic that one who has been elected to an office cannot recover the salary therefor if he has been illegally excluded from office and if the duties appertaining to the office have been discharged by a *de facto* incumbent, even though the occupant of the office is a mere intruder. *McKinley* v. *Chicago*, 369 Ill. 268.

Thus it is clear that although public office is in fact so greatly desired by many men that they will invest their private fortunes and passionate energies in seeking it, nevertheless the law does not recognize the right to such office as in any sense an individual, private, or personal right, and therefore the right to induction in public office is neither "liberty" nor "property" within the purview of the Fourteenth Amendment or civil rights acts.

Since the law does not even *recognize* any right in the individual to an office in which he has not actually been inducted, except such rights as may be enforced for and on behalf of all of the people in an action brought by the people or an elector, and since no such right even exists, *a fortiori* no such right is guaranteed or protected by the constitution of the United States or any statute enacted thereunder.

Let us now turn to the authorities recognizing these capital principles of law and social theory in contexts of circumstances more specifically and incisively applicable to the case at bar.

The teaching of the case of *Taylor* v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187, cited and discussed by counsel for the Horner executors, is cogent in its application to the case at bar. In that case it was held that those whose right to public office had been denied by the duly constituted authority of the state (in that case the state legislature) had no federal constitutional right to impeach such adverse determination. This case is thoroughly considered in the brief of the Horner executors; counsel's discussion is excellent and their quotations from the opinion are full. We shall therefore not repeat the substance of the discussion, but emphasize here that, as appears from the excerpts quoted in the brief of the Horner executors, the court held that the rights to public office accruing by virtue of an election are not impressed with federal constitutional guaranty. (We shall again briefly cite this case under the following subpoint on account of its holding that official proclamations in election matters are conclusive and cannot be the subject of collateral inquiry in independent proceedings.)

Another case which is apposite to the case at bar is the case of *Blackman* v. *Stone*, 17 Fed. Supp. 102, affirmed by the Circuit Court of Appeals on grounds not pertinent here in 101 F. (2) 500. Of course, that case is not authority here, but we cite and consider it because its reasoning is incisively applicable to the instant case. Appellant, doubtless appreciating and seeking to minimize the force of the District Court's decision as applied to the case at bar, actually cited this case at page 20 of his brief in the lower court.

That case was a suit in the District Court for the Southern District of Illinois and was entertained by a three-

judge court composed of Judges Evans, Barnes and Major. In that case the plaintiffs, members of the Communist party, brought a suit in equity to restrain various county clerks from printing ballots for the election of November 3, 1936, without including thereon the names of candidates designated in a petition for nomination of members of the Communist party. The defendants moved to dismiss the suit on two grounds; *first*, that the rights sought to be vindicated were

"political rather than civil rights;"

and *second*, a ground not relevant here, that equity will not intervene in political matters. The opinion is ably and carefully written. It affords a studious consideration of the discrimination, inherent and fundamental in legal principles and political theory, between political rights and civil rights. The court said at page 107:

> "The dictionaries and text writers who have attempted to define civil rights and distinguish them from political rights have not always succeeded in accentuating the line of demarcation. Nevertheless, definitions from leading authorities like Blackstone are helpful. Bouvier says, basing his distinctions on Blackstone,
>
> " '*Political rights* consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses.
>
> " '*Civil rights* are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights,—**which is not the case with political rights**; for an alien, for example, has no political, although in the full enjoyment of his civil, rights. 1 Bla. Com. 124-139.' "

After extensively considering the question, the court sums up its conclusion that the right of an aspirant for public office is not a civil right in the following language at page 110:

> "Our search for authorities outside of the briefs has not been productive of a single case which supports either of the two contentions which plaintiffs must maintain: (a) that a court of equity will act where political rights only are involved, or (b) that the right to vote or the right to have a name printed on the ballot is a civil right."

The Circuit Court of Appeals affirmed the District Court. However, affirmance was predicated upon the court's view that the complaint failed to show that in fact the plaintiffs were entitled to a place on the ballot.

In view of the well-written brief filed by counsel for the Horner executors, we shall not further protract our argument on this point.

(ii)

The official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally assailed.

The peace, order and stability of society and governments has required from the earliest days that official pronouncements, declarations and findings of fact must be final and conclusive; and that if the solemn recitals of officials charged by law with the ascertaining of the facts, whether such officials be judges, or those required to canvass petitions or returns in elections, may be assailed collaterally, there can be no certainty and hence no security in law. This is, of course, the principle underlying such doctrines as that of *res judicata*, for of what avail are the contests which precede the pronouncements of judgments if the judgments settle and therefore adjudge nothing?

The statutes of Illinois reposed in the present defendants and the deceased Governor Horner the duty of declaring whether the plaintiff had actually received the highest

number of votes. To hold that public officials who perform such duties may be called to account in private actions for damages would be not only to permit the impeachment of official declarations in private litigation, but would be to permit every disgruntled pretender to office to call those charged with the duty of announcing his victory or defeat to account in a civil action sounding in damages against their private estates. No matter how baseless the charge, public officials whose returns should be as conclusive as they are solemn would be called upon to spend their private means in defense of damage suits.

This principle is settled beyond all question by the decision of the Supreme Court of the United States in the case already cited of *Taylor* v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187. The Supreme Court of the United States said (L. Ed., page 1194):

> "The determination of the result of an election is purely a political question, and if such suits as this may be maintained, the greatest disorder will result in the public business. It has always been the policy of our law to provide a summary process for the settlement of such contests, to the end that public business shall not be interrupted; but if such a suit as this may be maintained, where will such a contest end?"

A wise rule of law provides that a judge who has rendered a corrupt decision may be impeached, may be disbarred as a lawyer, may be imprisoned—but he may not be called upon to defend his judgment, however flagrant his dereliction, in a private suit at the instance of the injured party, for to allow such actions would be to expose every judge to the peril of ruinous litigation for every decision which he made. It is perfectly true that the defendants in the present case were not judicial officers; but the considerations underlying the rule forbidding actions against judges and the principles which should likewise forbid the present action are identical. The defendants were charged by law with the duty of determining a fact of the utmost importance in a democracy—the fact of whether the defendant

was or was not duly nominated as a candidate for public office. To expose them to private litigation whensoever they should execute their duties by making such a determination would be to deter men of responsibility from accepting high public trust attended by the possibility of such ruinous consequences.

The present defendants respectfully adopt the arguments and citations made in the brief of the Horner executors.

CONCLUSION.

In view of the foregoing considerations, we respectfully submit that petitioner is not entitled, under the constitution, to alleged damages resulting from the acts charged, since those acts, being prohibited by statute, were not those of the state of or the defendants in their official capacity so as to come within the purview of the Fourteenth Amendment. We further submit that petitioner is not entitled, under the Civil Rights act, to damages resulting from the acts charged, because the right of candidacy for nomination at a primary election is not a civil right either apart from or under the constitution of the United States; and because the official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally attacked.

We therefore respectfully pray that this Court dismiss the petition for writ of *certiorari*.

Respectfully submitted,

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Attorney for respondent.

William C. Wines,
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